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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	CC Docket No. 92-115
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service	Docket No. 94-46 RM 8367
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	CC Docket No. 93-116

To: The Commission

PETITION FOR RECONSIDERATION

Source One Wireless, Inc. ("Source One"), an Illinois corporation, submits this its Petition for Reconsideration of the Report and Order in the above-referenced matters which was released September 9, 1994, and printed in the Federal Register on November 17, 1994, 59 Fed. Reg. 502 (1994). Accordingly, pursuant to §§1.4 and 1.429 of the Commission's Rules and Regulations, this Petition is timely filed.

Introduction

1. In this filing, Source One petitions for reconsideration of various rules in the referenced Report and Order affecting the 931 MHz applications. Source One Wireless operates paging facilities on 931.1875 MHz in the Chicago metropolitan area and in portions of six states (Minnesota, Wisconsin, Illinois, Indiana, Michigan and

Missouri). It is in the process of applying for and building out its system in the Midwest, South and Southeast.

2. Source One's interests will be adversely affected by the 931 MHz rules as promulgated by the referenced Report and Order.

Background

3. On May 20, 1994, the Commission released its Further Notice of Proposed Rulemaking ("FNPRM"), 9 FCC Rcd. 2596 (1994) in connection with the Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115.

4. Source One filed Comments in this proceeding on June 20, 1994. Its comments concerned the Commission's proposal in two respects: restriction of modifications of existing frequency applications to 1.6 miles from an existing station; and the amendment of pending applications.

5. On September 9, 1994, the Commission released its referenced Report and Order stating that all pending applications must be amended to reflect a frequency which is available within sixty days following January 1, 1995; any applications which have been granted, denied or dismissed which are being litigated will be resolved by existing rules; to the extent practicable, a thirty day filing cut-off period will be instituted; all mutually exclusive applications will be subject to auction; and applications will be considered to be new, not modifications, if the proposed facilities are beyond two kilometers from the existing base station. As is demonstrated below, Source One submits that these new requirements are contrary to administrative due process and represent agency decision making that is arbitrary, capricious and an abuse of discretion. Accordingly, consideration and grant of this petition is in the public interest.

Discussion

New Procedures for 931 MHz Application Processing Should Not Be Applied Retroactively

6. In the Report and Order, at paragraph 100, the Commission asserts that "... applying our new rules to pending applications, including those that have been previously granted but are subject to reversal because they cannot be resolved under the existing rules, does not constitute retroactive rulemaking."

7. It is the Commission's position that it can change rules for applicants stating in Report and Order, Supra, that it is "well-established that the Commission may apply new rules to pending applications." However, even in United States v. Storer Broadcasting Co., 351 U.S. 192, 193 (1956), which the Commission uses as support for its argument, the Court looked for an underlying purpose to support the retroactive application of new rules which required the dismissal of a pending application. It found that the FCC impose limitations on multiple ownership consistent with goal of avoiding over concentration of broadcasting facilities. Further, the Court stated, "We think the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole. An applicant files his application with knowledge of the Commission's attitude toward concentration of control." 351 U.S. 204-205.

8. Further, in Hispanic Information and Telecommunications Network vs. FCC, 865 F.2d 1289, 1295 (D.C. Cir. 1989), also cited by the Commission, the Court states that, "[T]he filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed." (Emphasis added). In that case also, the Court found that the Commission had a justifiable rationale for adopting rules which resulted in dismissing offending application: it had determined, based on the public interest rationale, that local educational institutions in mutually exclusive situations would be given priority on Instructional Television Fixed Service channels. In the present case, the Commission has

not come forth with a sufficient rationale for it to change its rules retroactively. The Commission is merely saying that it needs a fresh start and the 931 MHz process, which it had set in place, has become unmanageable. The applicants, the FCC's "customers"[1/], must pay for the Commission errors. The catch is that the Commission's database, which has become unmanageable. will have to be used by the applicant to find a frequency. The facts of this case and the Commission's rhetoric cannot withstand judicial scrutiny.

9. The Commission relies on Landgraf vs. Film Products, 114 S.Ct. 1483, 1499 (1994) for the proposition that its 931 MHz processing rules do not constitute a retroactive rule making. This case, however, does not stand for the concept put forth by the Commission. Landgraf does state that where a statute "would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed," that is "genuinely retroactive." 114 S.Ct. 1487. Here, the Commission requires that an applicant find a presently available frequency from an FCC database which is so hopelessly confused that even the Commission has given up on it, amend its application and subject itself, again, to a mutually exclusive situation and an auction or dismissal, when it had already filed an application previously, in some cases as long as almost five years, and had already passed the public notice period. Thus, Source One submits that, under Landgraf, the proposed 931 MHz application processing must be classified as retroactive. Likewise, in Chemical Waste Management, Inc. v. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989), the Commission's reliance is wrongly placed. The Court here stated that, in its regulation, the EPA "emphasized that its action would apply only to the future active management of leachate." (Emphasis Added.) The FCC's action here applies to pending applications.

1/ See Business Radio, Vol. XXX, No. 10 dated December 1994, wherein Mary Ann Richards, special counsel to the Government for Reinventing Government, Federal Communications Commission, states that the Commission is "implementing a program of providing better service for our 'customers'".

10. In Bowen v. Georgetown University Hospital, 488 U.S. 204, 209 (1988), the Court stressed that "Retroactivity is not favored in the law" and stated that there must be substantial justification, for retroactive rulemaking authority. Thus, it becomes a balancing test. See SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) which states that retroactive application is improper if "the ill effect of the retroactive application" of the rule outweighs the "mischief" that would result from frustrating the interest of the new rule. See also, Retail, Wholesale, and Department Store Union v. NLRB, 466 F.2d 380, 389-390 (D.C. Cir. 1972) ("Retail Union") and Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554-55 (D.C. Cir. 1987), where the D.C. Circuit enumerated the considerations in the resolution of the dilemma of whether the inequity of retroactive application is counterbalanced by significant interest. These considerations are: a) whether the case is one of first impression; b) whether the new rule represents an abrupt departure from well established practice or attempts to fill a void; c) the extent to which the party hurt by the new rule relied on the former rule; d) the degree of burden the retroactive order imposes; and e) the statutory interest in applying a new rule despite the reliance on the old standard. Retail Union , Supra at 390. Here, a) the 931 MHz processing is not a case of first impression; b) the processing procedures are a dramatic departure from existing procedures in that now, the applicant will choose its frequency using the Commission database that is inadequate to provide up-to-date information, encountering a second cut-off date and the prospects of dismissal if it guesses wrong from the inadequate FCC data; c) the applicants relied on the Commission to assign a frequency that it knew was available on the basis of its record-keeping; d) a substantial burden would rest on an applicant whose application had been pending for a number of years to guess correctly on a frequency or lose its application; and e) there is no statutory interest in applying the new rules promulgated by the Commission. In the latter regard, the Commission states only that "The confusion and uncertainty surrounding the old procedures for processing these applications require a rational 'fresh start' pursuant to

clearly articulated rules." Report and Order at Paragraph 98. But it expects the applicant to glean information from its records. This is not a rational fresh start. It is a continuation of the old problem, only this time the onus is on the applicant.

11. In Landgraf, supra at 1497 the Court reiterates as it did in Bowen that the presumption is against statutory retroactively which is founded upon "elementary consideration of fairness" dictating that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." The Court states in Landgraf that this presumption against statutory retroactively is deeply rooted in the Supreme Court's jurisprudence and "finds expression in several constitutional provisions." See also Chemical Waste Management, Inc. vs. EPA, 869 F.2d 1526, 1536 (D.C. Cir. 1989).

12. Because the Commission does not -- and cannot -- state a sufficient underlying substantial purpose, a public interest rationale, for its new procedural rules, to balance the inequities to the applicants, it cannot impose them on pending applications.

13. Source One agrees with the Personal Communications Industry Association, in a Petition for Reconsideration filed simultaneously, that the Commission should process all 931 MHz applications filed prior to January 1, 1995 under the existing, first come, first served rules, without the need for frequency-specific amendments.

Mileage Restrictions on existing frequency applications

14. Finally, Source One petitions the Commission concerning the mileage restrictions on applications for additional locations on existing frequencies. The Commission has always recognized that for purposes of providing wide-area paging service, co-channel facilities are required. See Lottery Selection Among Applications, 57 RR 2d 427, 437 (1984). In order for a licensee to efficiently and economically expand a wide-area system, a common frequency must be used at all locations. Id. Thus, frequencies for wide-area paging service are not fungible. Imposing such a small distance for expansion would subject the existing provider to increased susceptibility to mutually exclusive applications, particularly in light of the tidal wave of 931 MHz

applications which have recently hit the Commission. See Common Carrier Public Mobile Radio Service Information, Report Nos. PMS-95-08, 95-09 and 95-10, released November 23, 30 and December 7, 1994, respectively. This will be a natural environment for green-mail, perhaps in the form of "leasing" agreements to the wide-area provides from licensees who have no interest in operating a paging system. Even if that were not the case, rapid response to an existing subscriber request would not be possible if every application for expansion is mutually exclusive with some entity who does not plan to show up at an auction, but waits until that time to express its non-interest. Numerous auctions will have to be scheduled and the staff would again be burdened.

15. Source One submits that applications for additional sites should not be considered to be applications for new frequencies if they are more than 1.6 miles from an existing station. To build out a frequency in a certain area, implementation of such a proposal would require either needless expense in constructing a multitude of transmitters each 1.6 miles apart or provide opportunities for mutually exclusive applications at every turn. Thus, while Source One could support the concept of a limitation on mileage for additional transmitter sites, it opposes the 1.6 mile restriction. Source One agrees with several commentors below who suggest that licensing on a market area basis would alleviate future 931 MHz licensing build-out problems. This concept is important for wide-area paging service and is one that would allow flexibility to both the Commission and the carrier and would provide the public with more responsive service. Until that time, however, the Commission should use its present standard of 40 miles. See §22.525 of the Commission's Rules and Regulations.

Conclusion

WHEREFORE, the foregoing premises duly considered, Source One respectfully requests that the Commission consider and grant this Petition.

Respectfully submitted,

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